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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ARLOENE ELIZABETH WRIGHT, INA McCOY,
AND A. CLARK MOHR, PETITIONERS

V.

KECH-TV, ET AL, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OREGON

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February 20, 1986

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Petitioners Elizabeth Wright, Ina McCoy and Clark Mohr respectfully pray that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Oregon entered in this proceeding on October 15, 1985.

QUESTIONS PRESENTED FOR REVIEW

1. Whether to deny citizens judicial review of a land use permit affecting their property, when they learn of the permit only after the statutory time limit to file an administrative appeal has expired, violates their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

2. Whether the grant of a land use permit authorizing construction of a 1,000 foot tall television broadcasting tower and associated structures, in an area zoned exclusively for farm use, without notice to area residents, and without any hearing or findings, violates those residents' rights guaranteed by the Fourteenth Amendment.

3. Whether the grant of discretionary power to a government clerk to determine whether a use of land is a "utility facility," and whether such use is "necessary for public service," without any statutory definitions or standards, violates neighboring property owners' rights under the Fourteenth Amendment.

PARTIES TO THIS PROCEEDING

All petitioners are listed in the caption. All the respondents include: KECH-TV, a federally licensed television station, Greater Willamette Vision, Ltd., an Oregon limited partnership, Roger Loe, an individual, Willamette Subscription Television, Ltd., an Oregon limited partnership, and ABCD .... Vision, Inc., a California corporation.

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The opinion of the Oregon Supreme Court in this case, Wright v. KECH-TV, No. S31616, is reported at 300 Or 139, 707 P2d 1232 (1985). The opinion of the Oregon Court of Appeals is reported at 71 Or App 662, 694 P2d 545 (1985). The opinions are set out in full beginning at pages App-1 and App-9.

JURISDICTION

The judgment of the Oregon Supreme Court was entered on October 15, 1985. A timely petition for reconsideration was denied on November 26, 1985, and this petition was filed within 90 days thereafter. This court's jurisdiction is invoked under 28 USC Section 1257(3).

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment XIV:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves the following Oregon Statutes and Marion County Ordinances:

ORS 215.185

ORS 215.243

Oregon Laws 1979 chapter 772

MCZO 136.000 - 136.040

These provisions are set forth in the Appendix, beginning at App-19.

STATEMENT OF THE CASE

Oregon has established an elaborate state-wide planning process in which a primary goal is the protection of agricultural land from non-farm development. Local governments are required to adopt and obtain state approval of comprehensive plans, and implement those plans with zoning ordinances. The legislature has created an agency known as the Land Use Board of Appeals (LUBA), which is given "exclusive jurisdiction" to review any local "land use decision." Or. Laws 1979 c. 772 sec. 4(1), (App-20). LUBA has authority to affirm or reverse a land use decision, but does not have equitable powers.

At the time this case arose, the legislature required that the jurisdiction of LUBA had to be invoked "not later than 30 days after the date

the decision sought to be reviewed becomes final." Or. Laws 1979 c. 772 sec. 4(4), (App-22).

On July 10, 1981, respondents applied to Marion County for a permit to build a 950 foot tall television transmitting tower on land zoned for exclusive farm use. County zoning ordinance 136.020 allowed limited non-farm uses to be built on farm land, including "utility facilities necessary for public service." (App-27). The ordinance contained no definition of "utility facilities" nor standards for determining their "necessity" for public service.

On July 23, 1981, an unknown county official, without any notice to area residents, without conducting a hearing, and without making any findings, granted the permit authorizing construc-

tion of the tower. The permit was final and effective immediately. The statutory time limit within which to appeal the grant of that permit to the Land Use Board of Appeals expired thirty days later, on August 22, 1981.

Respondents took no observable action pursuant to the permit until late October, 1981, when they erected in a few days a prefabricated steel tower approximately 1000 feet tall, supported by guy wires and pylons. Nearby residents, including petitioners, first learned of the existence of the building permit only after they observed the completed tower.

The tower held a transmitting antenna that emitted 1,700,000 watts of microwave radiation, which some residents believed was a health hazard. The tower also bore numerous flashing strobe and red lights visible for miles. By its

dominance of the otherwise rural landscape, the tower radically changed the character of the region, and interfered with petitioners' use and enjoyment of their own properties. The tower and its related structures (control building, parking area, etc.) also took a significant amount of farmland out of production. Upon its construction, the tower appeared to violate virtually every statewide planning goal, as well as numerous standards set out in the county comprehensive plan and zoning ordinances.

In April, 1982, following the failure of negotiations, petitioners commenced this proceeding by filing their complaint for injunctive relief in the Marion County Circuit Court. The action was filed pursuant to a statute authorizing proceedings to enforce land use regulations (ORS 215.185, App-19).

Petitioners' sought the removal of the tower, and other appropriate relief, based on the tower's alleged violation of numerous land use provisions. Petitioners also expressly alleged in their original and amended complaint that the method by which the building permit was issued violated their rights under the Fourteenth Amendment. The amended complaint alleged in paragraph IX(9) that:

> "The uses were constructed under a federal permit and county permit (which plaintiffs do not by this allegation accept were legally obtained) and are thus clothed with a degree of governmental participation sufficient to warrant application to this situation of the provisions of the United States Constitution Amendments V and XIV and the Oregon Constitution, Article I, Section 20. The permits obtained by the defendants purported to authorize a use that substantially impairs plaintiffs' use of their own property by interfering with their view and bombarding them with extreme dosages of electromagnetic radiation. The permits were granted without any meaningful attempt to minimize such

> obvious adverse effects upon plaintiffs or to provide plaintiffs with an opportunity to protect those attributes of their lives which were assaulted. The existence of the tower and related uses thus constitutes an unlawful deprivation of plaintiffs' liberty and property and is a grant of exceptional privileges to the defendants. The proper remedy for such infringement upon plaintiffs' rights is the removal of the tower. Such a remedy for plaintiffs' injury is also required by Oregon Constitution, Article I, Section 10. (Amended Complaint IX(9)).

Respondents moved to dismiss the amended complaint on the ground that the trial court lacked subject matter jurisdiction, arguing that under Or. Laws 1979 c. 772, only the administrative agency LUBA could adjudicate petitioners' claims. The trial court allowed the motion. The court's letter opinion is included at App-15, and its Judgment of Dismissal at App-17.

Meanwhile, during the pendency of the circuit court action (and while

expressly reserving their judicial claims), petitioners filed an appeal of the permit-issuance to the Land Use Board of Appeals, alleging the unconstitutionality of the permit process and the illegality of the structure itself. LUBA dismissed the appeal for lack of jurisdiction, on the grounds that it was not timely filed under Oregon Laws 1979, chapter 772, section 4(4), the 30 day appeal time limit. (App-22). Petitioners sought judicial review of LUBA's dismissal in the Oregon Court of Appeals. That court affirmed the dismissal and the Oregon Supreme Court denied review. McCoy v. Marion County, 69 Or App 522, 686 P2d 1059, rev den 298 Or 334 (1984).

Petitioners also appealed the circuit court's dismissal of the present action to the Oregon Court of Appeals, alleging, among other grounds for rever-

sal, the violation of their Fourteenth Amendment rights to due process of law and equal protection of the laws in the granting of the permit without notice or hearing. Petitioners also alleged that the circuit court's denial of judicial jurisdiction, coupled with the agency's denial of administrative jurisdiction, left them without any forum in which to adjudicate their various claims, and therefore constituted a separate, continuing violation of their Fourteenth Amendment rights. These claims were presented to the Oregon Court of Appeals in petitioners' opening brief, which stated:

"THIS DECISION LACKED MINIMAL DUE PROCESS

> A valid quasi-judicial decision requires a certain minimal level of what can be categorized as "due process" rights, flowing from the United States Constitution Amendments

V and XIV and the Oregon Constitution Article I sections 10 and 20, and perhaps sections 1 and 33 as well. The minimal constitutional due process rights are these:

1. The right to a public factfinding hearing;

2. The right to notice of the hearing;

3. The right to an impartial tribunal;

4. The right to an allocation of burden of proof based upon rational and definite standards;

5. The right to cross examine or at least question to some degree the proponent's witnesses;

6. The right to present evidence, perhaps including the right to subpoena witnesses; and

7. The right to receive a rational decision containing written finds of fact.

*****

"Plaintiffs have been the victims of a monumental lapse of due process. As a result there has been no valid approval of the tower's location. Since it is patently inconsistent with its zone the plaintiffs are entitled to its removal." [Appellants' Brief pages 19-20]

*****

"Plaintiffs must shirk for the present the Anderson v. Peden necessity of tracing in detail the constitutional lineage of their rights, and so will do little more than state the endowing provisions of the organic law:***

"United States Constitution Amendment XIV:

'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"These provisions require the 'standards' refered [sic] to in Bergford v. Clackamas County, 15 Or App 362, 515 P2d 1345 (197[3])." Appellants' Brief pages 23-24.

After filing their Appellants' Brief in the Court of Appeals, the petitioners filed in due course their Reply Brief, which again summarized their position:

"The defendants either fail to grasp or consciously ignore

> plaintiffs' argument: whether this tower is a permitted use is a question that requires evidence. As citizens the plaintiffs are entitled to rely on the rational application of zoning ordinances and statutes. Given those laws, the Fourteenth Amendment of the federal constitution and Article I, Section 10 and 20 of the state constitution require that the proponents of the tower demonstrate to an impartial tribunal that the non-farm structure is a utility facility and that it is necessary in size, location and radiation output. In the absence of such a process, no permit for the tower is constitutionally valid. Plaintiffs are entitled to initiate such a fact-finding process in the circuit court and to obtain appropriate relief if the evidence shows the structure not to comply with law." Appellants' Reply Brief page 1.

The Oregon Court of Appeals' opinion rejected petitioners' constitutional arguments and affirmed the circuit court's judgment of dismissal. (App-9).

Petitioners then sought review in the Oregon Supreme Court, alleging in their initial pleading to that court that they were denied Fourteenth Amendment due process by the initial lack of a hearing,

and by the subsequent unavailability of any judicial forum:

> "At the time plaintiffs became aware of the non-farm (and hence unlawful) tower, which they have alleged interfered with their use and enjoyment of their property, Or Laws 1979 ch 772, sec 4(4) expressly excluded a LUBA remedy.
>
> "With the dismissal of this action plaintiffs have been left without any remedy, in violation of Oregon Constitution Article I, Section 10:***
>
> "Plaintiffs have also been deprived of the due process of law and equal protection of the laws guaranteed them by the United States Constitution Amendment XIV:
>
> "'***nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'" [Petition for Review page 2.]
>
> *****
>
> "The plaintiffs have been the victims of a substantial lapse in the rational governmental decision-making vouchsafed by a variety of constitutional provisions, as discussed below." Petition for Review page 4.

Petitioners' Petition for Review then

quoted Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) to illustrate what they called their "classical denial of the due process of law guaranteed by the United States Constitution Amendment XIV." (Petition for Review page 7)

The Oregon Supreme Court affirmed the dismissal of petitioners' complaint for lack of jurisdiction, but chose to avoid ruling expressly on petitioners' Fourteenth Amendment claims. In trying to understand that choice it must be noted that the opinion contains two inaccurate statements. The first is in footnote 13, where the court stated:

> "Plaintiffs also maintain that, although treated as ministerial by the county, the issuance of the permits should have been treated as quasi-judicial. Plaintiffs argue that the county's failure to provide them notice and an opportunity for a hearing violated their constitutional rights. Whatever the merits of this argument might be, the plaintiffs did

> not allege it in the complaint filed in the circuit court, and we do not address it." (300 Or 147, App-8), (emphasis supplied).

The underlined statement is not true -- the petitioners expressly alleged denial of their Fourteenth Amendment rights in paragraph IX(9) of their amended complaint, which is set out in full on page 15 above. The underlined assertion is also contrary to the court's prior statement in the body of the opinion that:

> "Plaintiffs have insisted since the outset of this proceeding that the issuance of the permits was a quasi-judicial decision made under standards so vague as to be unconstitutional." (300 Or 144, App-5)

For whatever reason the court did not expressly rule on the petitioners' Fourteenth Amendment claims, the court was aware that they had been raised "since the outset" and were thus necessarily decided by the court's

affirmance.

The second statement that is contrary to the record is that petitioners "***at oral argument abandoned their administrative law theory in favor of the separation of powers theory advanced in the original petition for review." (300 Or 145, App-6). Although the court did not contend that petitioners abandoned their constitutional theory, there may be some confusion as to what is encompassed by the the remark. Prior to oral argument, petitioners had filed their "Memorandum In Response to the Questions of the Supreme Court," which contained a thorough explanation of their view of the administrative law issues invclved in the case. Petitioners re-stated their reliance on those points several times during oral

argument, while suggesting in addition that the administrative issues were subsumed by their constitutional theories (tape recording of oral argument at tape counter 3896, 4210, 5451, 5492, 5598). No issues were abandoned at any time, as petitioners believe this Court will agree in the exercise of its independent judgment. U.S. v. Larionoff, 431 U.S. 864, 873, note 13.

Appellate review of this proceeding was somewhat delayed when respondent Greater Willamette Vision filed a Chapter 11 bankruptcy petition. The automatic stay remained in effect for a number of months, until petitioners obtained an order for relief. Neither that bankruptcy, nor any intervening changes in the law, have affected the size or location of

the tower, or the substance of this litigation.

REASONS TO GRANT WRIT

1. The Oregon Supreme Court decided a federal question in a way that conflicts with applicable decisions of this Court. The lower court decided that the Fourteenth Amendment does not require the state to provide petitioners with some forum in which to adjudicate their constitutional and statutory rights arising under a zoning ordinance.

The Oregon court's decision is directly contrary to this Court's holding in Logan v. Zimmerman Brush Co. 455 U.S. 422 (1982). Logan holds that a state may not terminate one's cause of action because a government official, for reasons beyond the claimant's control, fails to comply with required procedure.

In Logan the property interest to be protected was an employment discrimination claim, which was extinguished when a clerk failed to set a timely hearing.

In this case petitioners seek the right to protect their use and enjoyment of their real property by enforcing applicable zoning ordinances, which is a 'property interest.' This right was initially compromised when respondents, and the county building department, failed to give any public notice of respondents' application for a discretionary permit to build the tower in an exclusive-farm-use zone. As a result of this fortuity beyond their control, petitioners were deprived of their due process right to be heard.

Nor were petitioners or other area residents notified when the permit

was issued, which was the date initiating the statutory 30 day period in which an administrative appeal of the legality of the proceedings could have been filed. As a result of this fortuity petitioners lost their right to an agency adjudication.

Petitioners became aware of the months-old administrative action only after they observed the already-built tower. At that juncture the circuit court was the sole tribunal available. The court's failure to exercise jurisdiction then left petitioners, for reasons beyond their control, precisely in Mr. Logan's footsteps -- with no access to the means necessary to enforce their rights.

In discussing the due process implications of such a situation in another context, the Court recognized its

virtually primae facie unconstitutionality. In Bob Jones University v. Simon 416 U.S. 725, 746 (1974) the Court stated:

> "This is not a case in which an aggrieved party has no access at all to judicial review. Were that true, our conclusion might well be different."

Last term, in South Carolina v. Regan 465 U.S. 367 (1984), the Bob Jones University dictum was bolstered by both the majority (465 U.S. 380) and concurring opinion (due process issues implicated for an individual by "the complete inaccessibility of judicial review ***." (465 U.S. 394).

At stake in the present case are fundamental due process rights. The Oregon court's decision, that the failure to provide plaintiffs notice and a hearing was inconsequential in the land use context, cannot be squared with any

modern decision of this Court. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), Boddie v. Connecticut, 401 U.S. 371 (1971), Mathews v. Eldridge, 424 U.S. 319 (1976), Kremer v. Chemical Const. Corp., 456 U.S. 461 (1982), Cleveland Bd. of Education v. Loudermill, 53 LW 4306 (1985).

2. The Oregon Supreme Court has decided an important question of federal law which has not been, but should be, settled by this Court: Do the Fourteenth Amendment's due process and equal protection clauses apply to local land use decisions in the same fashion as they do to other areas of administative decisionmaking?

The state court's negative answer to this question seriously limits the scope of the Fourteenth Amendment's most basic protections.

This Court has frequently delineated the parameters of due process in entitlement and employment cases (as for example in Mathews v. Eldridge, 424 U.S. 319 (1976), and Cleveland Board of Education v. Loudermill, 53 LW 4306 (1985). In land use cases, however, the Court's decisions have tended to focus on constitutional issues raised by local "legislative," as opposed to "administrative" action. See for example Moore v. East Cleveland, 431 U.S. 494 (1977), Schad v. Mount Ephraim, 452 U.S. 61 (1981), Williamson Co. Regional Planning Comm. v. Hamilton Bank, 53 LW 4969 (1985).

The distinction between legislative land use regulation -- establishing general principles of wide application, and administrative regulation -- deciding particular issues

involving specific uses of individual parcels, is widely observed at the state level, but has rarely been mentioned by this Court. Indeed, apparently the Court's only detailed discussion of these categories of local administrative law has been undertaken by Justice Stevens, writing in City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976). That case turned on a town electorate's right to exercise legislative-type authority through its power of referendum. In his dissenting opinion, Justice Stevens relied on the "handful of zoning cases" decided by this Court, and "many well-reasoned state-court decisions," (426 U.S. 683), to summarize the law as follows:

> "Specialists in the practice of zoning law are unhappily familiar with the potential for abuse which exists when inadequate procedural safeguards apply to the dispensation of special grants. The power to deny

> arbitrarily may give rise to the power to exact intolerable conditions. The insistence on fair procedure in this area of the law falls squarely within the purpose of the Due Process Clause of the Fourteenth Amendment.
>
> "When we examine a state procedure for the purpose of deciding whether it comports with the constitutional standard of due process, the fact that a State may give it a "legislative" label should not save an otherwise invalid procedure. [426 U.S. 685-686].
> *****
> "The essence of fair procedure is that the interested parties be given a reasonable opportunity to have their dispute resolved on the merits by reference to articulable rules. If a dispute involves only the conflicting rights of private litigants, it is elementary that the decision-maker must be impartial and qualified to understand and apply the controlling rules." 426 U.S. 692-693.

Similar statements by Justice Stevens have been cited approvingly in other cases (see for example Schad v. Mount Ephraim, supra, 452 U.S. 61), and the basic accuracy of Eastlake's due process discussion relative to state

administrative land use regulation has never been questioned. Still, no opinion of this Court has ever specifically held that the Fourteenth Amendment's due process and equal protection clauses apply to local administrative land use regulation.

The present case involves no complicating factors such as the legislative nature of the community referendum that was at issue in Eastlake. Rather, this case involves purely an issue of property rights between private parties that must be resolved by a government official. It is a propitious time to rigorously evaluate Justice Stevens' model.

3. The Oregon Supreme Court has decided a federal question in a way in conflict with the decision of another state court of last resort, and of a

federal court of appeals. The court below decided that the Fourteenth Amendment does not require a judicial hearing to review allegations that a previous land use decision was made without notice or rational factfinding. The general rule, however, is that such an administrative determination is always subject to judicial scrutiny for significant lapses in fundamental fairness. Minnkota Power Co-Op, Inc. v. Lake Shure Properties, 289 NW 2d 230 (N.D. 1980). The federal rule is in accord:

> "An administrative proceeding infected with fundamental procedural error, like a void judicial judgment, is a legal nullity and subject to collateral attack." Winterberger v. General Teamsters, 558 F2d 923, 925, (9th Cir 1977).

4. This case is especially illustrative of basic principles.

Logan v. Zimmerman Brush Co., supra, 455 U.S. 422, generated a

difference of opinion among the Court as to whether its result, upon which each justice agreed, was best achieved via application of the due process or the equal protection clause. The present case also involves both doctrines. The combination of this case's similarities with, yet expansion of, the facts of Logan, makes it an excellent vehicle for the possible refinement of the analytical framework employed at this basic level of constitutional inquiry.

5. Oregon's land use system is widely regarded as a national model for states trying to develop effective land use controls. That the Oregon system as applied may compromise traditional principles of due process and equal protection, is an issue of special concern to all states striving to develop a modern, socially responsible approach

to land use regulation. A reminder from this Court that efficiency must be tempered with regard for fundamental fairness, could avert numerous Fourteenth Amendment claims that might otherwise arise from this burgeoning area of state administrative law.

CONCLUSION

For the reasons discussed above a writ of certiorari should issue to review the judgment and opinion of the Oregon Supreme Court.

Respectfully submitted,

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IN THE SUPREME COURT OF THE
STATE OF OREGON

WRIGHT et al,
Petitioners on Review.
v.
KECH-TV et al,
Respondents on Review.
(CC 133,264; CA A28750; SC S31616)

In Banc

On review from the Court of Appeals.*

Argued and submitted September 3, 1985.

Jossi Davidson, Silverton, argued the cause and filed the petition for petitioners on review.

Michael Duane Brown, Salem, argued the cause for respondents on review. With him on the response to the petition for review was Churchill, Leonard, Brown & Donaldson, Salem.

Lawrence R. Derr, of Weiss, DesCamp, Botteri & Huber, Portland, filed an amicus curiae brief on behalf of Tower Action Committee.

Robert C. Cannon, Marion County Legal Counsel, Salem, filed an amicus curiae brief on behalf of Marion County.

JONES, J.

The Court of Appeals is affirmed.

* Appeal from Marion County Circuit Court, Richard D. Barber, Judge. 71 Or App 662, 694 P2d 545 (1985).

JONES, J.

Plaintiffs seek review of the Court of Appeals decision affirming the dismissal of their complaint by the Marion County Circuit Court. Plaintiffs brought this action to compel removal of defendant KECH-TV's transmission tower and related facilities from land designated for exclusive farm use in the Marion County Comprehensive Plan and implementing zoning ordinances. We affirm the Court of Appeals.

In June and July, 1981, Marion County issued permits for construction of a television transmission tower and adjoining building. The tower was erected in October 1981. The county processed the applications for the permits as if the proposed use was a permitted use in a farm use zone[1] and, consequently, did not conduct quasi-judicial proceedings in connection with issuance of the permits.[2]

In April 1982, plaintiff Wright commenced this action in the Marion County Circuit Court by filing a complaint which she characterized as a request for injunctive relief.[3] In June 1983, the circuit court dismissed the complaint

---

[1] ORS 215.213 sets forth the non-farm uses that are permitted uses in any area zoned for exclusive farm uses. Before amendment in 1983, the list of permitted uses included "[u]tility facilities necessary for public service, except commercial facilities for the purpose of generating power for public use by sale." ORS 215.213(1)(d) (1981). The 1983 amendment, Or Laws 1983, ch 827, § 27b, changed subsection (1)(d) to read:

"Utility facilties necessary for public service, except commercial facilities for the purpose of generating power for public use by sale *and transmission towers over 200 feet in height.*" (New language emphasized.)

[2] At the time this action arose, the Marion County zoning ordinance that addressed exclusive farm use zones incorporated the language of ORS 215.213(1)(d), *see supra* note 1, and allowed as a permitted use in an exclusive farm use zone "[u]tility facilities necessary for public service, except commercial facilities for power generation." Marion County Zoning Ordinance 136.020(d).

[3] Plaintiffs prayed for judgment against the defendants as follows:

"1. Requiring the defendants to cease using the tower and related facilities;

"2. Requiring the defendants to remove the KECH and ON TV broadcasting tower, wires, pylons, building, foundations, bridge, equipment, parking lot, fence, road, and every other related condition, use or structure located on land near 5252 Davis Creek Road, Marion County, Oregon;

"3. Requiring the defendants to restore the land to the same degree of farmable utility it enjoyed prior to the presence of the above mentioned conditions, structures and uses;

"4. Requiring the defendants to comply with the decree within a reasonable

for lack of subject matter jurisdiction on the ground that the complaint presented land use questions within the exclusive jurisdiction of the Land Use Board of Appeals (LUBA). The Court of Appeals affirmed. *Wright v. KECH-TV*, 71 Or App 662, 694 P2d 545 (1985). Meanwhile, in April 1983, plaintiffs herein filed a notice of intent to appeal the county's decision to LUBA. LUBA dismissed the appeal as untimely under Oregon Laws 1979, chapter 772, section 4(4) (*amended by* Or Laws 1981, ch 748). The Court of Appeals affirmed LUBA. *McCoy v. Marion County*, 69 Or App 522, 686 P2d 1059, *rev den* 298 Or 334 (1984).

Under the land use statutes in effect in July 1981, LUBA had exclusive jurisdiction to review "land use decisions," defined in pertinent part as:

> "(a) A final decision or determination made by a city, county or special district governing body that concerns the adoption, amendment or application of:
>
> "(A) The state-wide planning goals;
>
> "(B) A comprehensive plan provision; or
>
> "(C) A zoning, subdivision or other ordinance that implements a comprehensive plan * * *." Or Laws 1979, ch 772, § 3, now codified at ORS 197.015(10).[4]

The initial inquiry, then, is whether the issuance of the permits by Marion County was a land use decision as defined. The county's issuance of the permits was a determination that "concern[ed] the * * * application of * * * [a] zoning * * * ordinance that implements a comprehensive plan," Marion County Zoning Ordinance 136.020(d), and was a land use decision under the definition in effect at the time. We note that plaintiffs do not claim otherwise.

---

period of time not to exceed 60 days;

"5. Enjoining the defendants from offering to or allowing the use of the tower and related uses by any other person or organization pending execution of the requested judgment;

"6. Awarding plaintiffs their costs and disbursements incurred herein; and

"7. Granting to plaintiffs such further relief as may be equitable and appropriate under the circumstances."

[4] This definition was not altered by the 1981 amendments to the land use statutes, which became effective August 21, 1981. Or Laws 1981, ch 748, § 62.

Because the county's decision was a land use decision, a notice of intent to appeal the decision was required to be filed with LUBA "not later than 30 days after the date the decision sought to be reviewed becomes final." Or Laws 1979, ch 772, § 4(4) (*amended by* Or Laws 1981, ch 748).[5] The plaintiffs failed to file within the 30-day time period and by statute their appeal to LUBA was time-barred.

Our concern in allowing review was that if no right to notice or hearing is provided in connection with certain types of decisions that are technically "land use decisions" within LUBA's exclusive jurisdiction, there will be cases (such as this one) in which persons who might be aggrieved or adversely affected by the decision will not learn of it until well after the limitation period has run. Those persons effectively will be left without a forum, through no fault of their own.[6]

The legislature apparently recognized this problem and, in 1983, redefined "land use decision" specifically to exclude "a ministerial decision of a local government made under clear and objective standards contained in an acknowledged comprehensive plan or land use regulation and for which no right to a hearing is provided by the local government." ORS 197.015(10)(b); Or Laws 1983, ch 827, § 1.

The 1983 enactment of ORS 197.015(10)(b) does not help plaintiffs. Plaintiffs have not persuaded us that the redefinition of "land use decision" to exclude ministerial-type decisions was intended to clarify what the legislature had intended all along. *Cf. 1000 Friends of Oregon v. Wasco County Court,* 299 Or 344, 358 n 15, 703 P2d 207 (1985). To the contrary, plaintiffs seem to acknowledge that the intent of the

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[5] *Repealed by* Or Laws 1983, ch 827, § 59. ORS 197.830(7) now provides a 21-day limitation period.

[6] In *McCoy v. Marion County,* 69 Or App 522, 525-26, 686 P2d 1059 (1984), the issue was raised whether the limitation period might be tolled under some circumstances. In that case, LUBA suggested that there may be circumstances in which a petitioner would be excused from acting within 30 days of the land use decision. The Court of Appeals felt it unnecessary to consider the issue, commenting:

> "It is absolutely clear from petitioners' arguments, the record and matters subject to judicial notice that petitioners were aware of the structures and of the county's involvement in permitting them *far more* than 30 days before their appeal to LUBA was filed. * * *" (Emphasis in original.)

legislature at the time Marion County issued the contested permits was for LUBA to review those decisions.[7]

Furthermore, even if we assume that LUBA's exclusive jurisdiction as provided by the 1979 statute was never intended to extend to "ministerial decisions made under clear and objective standards for which no right to a hearing is provided," ORS 197.015(10)(b), such an interpretation of that statute would not benefit plaintiffs. Plaintiffs have insisted since the outset of this proceeding that the issuance of the permits was a quasi-judicial decision made under standards so vague as to be unconstitutional. This alone forecloses plaintiffs from relying on a theory that *ministerial decisions* have never been within the ambit of LUBA jurisdiction. In any event, even if ORS 197.015(10)(b) had been in effect when Marion County issued the permits, the "ministerial decision" exclusion would be inapplicable because the language of the statute requires that the ministerial decision be made under standards "contained in an *acknowledged* comprehensive plan or land use regulation" (emphasis added). The county's comprehensive plan was not acknowledged until June 1982.[8]

Plaintiffs vigorously argued on appeal that they should not be required to seek LUBA review of the issuance of the permits because LUBA is unconstitutional. They argue that under Article III, section 1, and Article VII (Amended), section 1, of the Oregon Constitution, a single entity like LUBA cannot simultaneously be a non-judicial body and perform judicial functions.

In their petition for review of the Court of Appeals

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[7] As an example, in Appendix 9 of plaintiffs' brief before the Court of Appeals, they state, "The legality of the tower's location is on its face a land use question within LUBA's jurisdiction." Similar statements were made throughout oral argument before this court.

[8] Plaintiffs also rely on ORS 197.825(4)(a), enacted by Oregon Laws 1983, chapter 827, section 30, which provides in part:

> "Notwithstanding subsection (1) of this section [providing for LUBA's exclusive jurisdiction to review land use decisions], the circuit courts of this state retain jurisdiction:
>
> "(a) To grant declaratory, injunctive or mandatory relief in proceedings arising from decisions described in ORS 197.015(10)(b) or proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations; * * *"

This statute was enacted well after plaintiffs' complaint was dismissed by the circuit court, and is not relevant to the resolution of this case.

decision, plaintiffs continued to focus on the constitutional issues. We initially denied review. Plaintiffs thereafter filed a petition for reconsideration of that denial, which was allowed. The decision to allow review was not prompted by any concern on the part of the court regarding the constitutionality of LUBA. We allowed review because of administrative law questions raised by the jurisdictional "KECH-22"[9] encountered by plaintiffs in the course of this action.

In an effort to focus the parties' attention on the administrative law aspects of the case, we directed three questions to counsel and requested memoranda of law in response to be submitted in advance of oral argument.[10] Plaintiffs filed the requested memorandum, but at oral argument abandoned their administrative law theory in favor of the separation of powers theory advanced in the original petition for review.[11] We need not pursue the administrative law questions here.

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[9] *See McCoy v. Marion County, supra*, 69 Or App at 526 n 4. The Catch-22 is that the plaintiffs could not invoke LUBA jurisdiction because they did not know of the land use decision in time, were denied jurisdiction in the circuit court because the decision lies within LUBA's exclusive jurisdiction and, eventually, were denied LUBA jurisdiction because, once again, their petition to LUBA was time-barred.

[10] The questions were:

"1. ORS 197.825 (before the 1983 addition of subsection (2)) gave LUBA 'exclusive jurisdiction to review any land use decision of a local government.' In litigation to which a government agency is not a party, outside the land use context, one party sometimes relies on an agency rule or other action while the other party challenges the validity of the rule or other action relied on. How do courts generally deal with such a challenge? Is this kind of decision treated as judicial review of agency action within the meaning of statutes that prescribe the method for such review?

"2. In this case, do ORS 197.825(2) and ORS 197.830 bear on the foregoing question insofar as they assume that one who petitions LUBA for review must have had the opportunity to exhaust other remedies, that the petitioner must have appeared before the local government, and that the local government will transmit the record of its proceeding to LUBA?

"3. If a plaintiff challenges a defendant's reliance on a governmental rule or another action which the plaintiff did not challenge (and sometimes could not have challenged) directly, are all grounds available to the plaintiff procedural as well as substantive?"

[11] At oral argument before this court, counsel for plaintiffs said:

"There arose from the hills a behemoth tower and the people were stunned. This is a case about those people's rights. The truest resolution of the issues flows from the direct application of Article I, section 10, Article III, section 1, and Article VII, section 1, [of the Oregon Constitution]. There's solid precedent for this approach [citing opinions]. There's also an administrative law solution to the

We reject plaintiffs' arguments regarding the constitutionality of LUBA. The starting point in a separation of powers analysis is Article VII (Amended), section 1, of the Oregon Constitution, which provides in part:

> "The judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law. * * *"

LUBA is directed by statute to "conduct review proceedings upon petitions filed in the manner prescribed." ORS 197.820(1) (*former* Or Laws 1979, ch 772, § 2(a)(1)). The agency is empowered to conduct review of land use decisions through quasi-judicial proceedings. LUBA is a tribunal created by the state to ensure that local governments do not misapply the state land use statutes and related goals and rules. That this function is carried out through case-by-case decisionmaking in a quasi-judicial setting does not violate the doctrine of separation of powers as expressed by Article VII (Amended), section 1, or Article III, section 1, of the Oregon Constitution.

Previous cases make it clear that the doctrine of separation of powers does not prevent the exercise of adjudicatory functions by administrative agencies. *See, e.g., Mallatt v. Luihn,* 206 Or 678, 294 P2d 871 (1956); *Evanhoff v. State Industrial Acc. Com.,* 78 Or 503, 154 P 106 (1915); *In re Willow Creek,* 74 Or 592, 144 P 505, 146 P 475 (1915); *see also Baxter v. Monmouth City Council,* 51 Or App 853, 627 P2d 500 (1981). We now hold that the doctrine of separation of powers does not prevent the exercise of adjudicatory functions by LUBA.

Plaintiffs also claim that ORS 215.185 authorizes this action for injunctive relief to be brought in circuit court. ORS 215.185 provides in relevant part:

> "In case a building or other structure is, or is proposed to be, located, constructed, maintained, repaired, altered, or used, or any land is, or is proposed to be, used, in violation of an ordinance or regulation designed to implement a comprehensive plan, the governing body of the county or a person

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problem, as focused by the court's questions. Plaintiffs believe this could be viewed simply as an exhaustion of administrative remedies case. But really this is not an administrative law case. This is a separation of powers case."

> whose interest in real property in the county is or may be affected by the violation, may, in addition to other remedies provided by law, institute injunction, mandamus, abatement, or other appropriate proceedings to prevent, temporarily or permanently enjoin, abate, or remove the unlawful location, construction, maintenance, repair, alternation, or use. * * *"

If plaintiffs' complaint alleged that defendants violated or proposed to violate the terms of the permits or the Marion County ordinance under which they were issued, perhaps the complaint would allege a claim for relief cognizable in circuit court because no "land use decision" made by a "local government"[12] would be at issue. LUBA would not be the correct forum. The complaint, however, clearly challenges the issuance of the permits by the county, and not the subsequent actions taken pursuant to the permits by the defendants. The thrust of the complaint is that the issuance of the permits violated the statewide land use planning goals, raising issues lying exclusively within the jurisdiction of LUBA.[13]

The Court of Appeals is affirmed.

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[12] "Local government" is defined in ORS 197.015(12) as

> "* * * any city, county or metropolitan service district formed under ORS chapter 268 or an association of local governments performing land use planning functions under ORS 197.190."

[13] Plaintiffs also maintain that, although treated as ministerial by the county, the issuance of the permits should have been treated as quasi-judicial. Plaintiffs argue that the county's failure to provide them notice and an opportunity for a hearing violated their constitutional rights. Whatever the merits of this argument might be, the plaintiffs did not allege it in the complaint filed in the circuit court, and we do not address it. We note, however, that insofar as a land use decision is challenged on constitutional grounds, LUBA has statutory authority to decide constitutional questions. *See former* Or Laws 1981, ch 748, §§ 4(7) and 5(4)(a)(E); ORS 197.830(11), 197.835(8)(a)(E).

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

WRIGHT et al,
Appellants,

v.

KECH-TV et al,
Respondents.

(133,264; CA A28750)

Appeal from Circuit Court, Marion County.

Richard D. Barber, Judge.

Argued and submitted November 14, 1984.

Jossi Davidson, Silverton, argued the cause and filed the briefs for appellants.

Michael Duane Brown, Salem, argued the cause for respondents KECH-TV, Greater Willamette Vision, Ltd., Roger Loe, and Willamette Subscription Television, Ltd.

No appearance for respondent ABCD...Vision, Inc.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

RICHARDSON, P. J.

Affirmed.

RICHARDSON, P. J.

Plaintiffs brought this action to compel the removal of defendant KECH-TV's transmission tower from land in an exclusive farm use zone. The trial court granted defendants' motion to dismiss on the ground that the Land Use Board of Appeals has exclusive subject matter jurisdiction over the questions presented in the action. Plaintiffs appeal, and we affirm.

Defendants installed the tower and related facilities in October, 1981, after receiving the necessary permits from Marion County. The county did not conduct quasi-judicial proceedings in connection with its issuance of the permits, because it regarded the use as a permitted one in the zone and it therefore believed quasi-judicial procedures to be unnecessary. This action was initiated in April, 1982, and it was dismissed in June, 1983.[1]

Plaintiffs' first argument on appeal is that they were entitled to invoke the court's jurisdiction rather than LUBA's, because the relief they seek is "the removal of an unlawful structure" and LUBA cannot provide that remedy. Plaintiffs encase their argument in constitutional and other elaborately stated trappings, none of which succeeds in detracting from the argument's underlying simplicity or from the simplicity of the answer. The legislature can and has conferred jurisdiction on LUBA rather than the courts to review land use decisions, and the fact that plaintiffs desire relief that is beyond LUBA's remedial authority does not give plaintiffs the right to seek circuit court review of the county's land use decision. Whether plaintiffs could have sought judicial remedies *if* they had first pursued a successful appeal to LUBA is a question we need not decide, because plaintiffs did not follow that route. *See* ORS 215.185.[2]

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[1] In April, *1983*, plaintiffs appealed to LUBA from the county's 1981 decision to issue the permits. LUBA dismissed the appeal as untimely, and we affirmed the dismissal. *McCoy v. Marion County*, 69 Or App 522, 686 P2d 1059, *rev den* 298 Or 334 (1984).

[2] ORS 197.825 was enacted through Oregon Laws 1983, chapter 827, section 30, and took effect after this action was dismissed. Subsection (1) of that statute reenacts the earlier statutory conferral on LUBA of exclusive jurisdiction to review land use decisions. Subsection (4) of the statute provides:

Plaintiffs argue that ORS 215.185(1) authorizes this action. It provides in relevant part:

> "In case a building or other structure is, or is proposed to be, located, constructed, maintained, repaired, altered, or used, or any land is, or is proposed to be, used, in violation of an ordinance or regulation designed to implement a comprehensive plan, the governing body of the county or a person whose interest in real property in the county is or may be affected by the violation, may, in addition to other remedies provided by law, institute injunction, mandamus, abatement, or other appropriate proceedings to prevent, temporarily or permanently enjoin, abate, or remove the unlawful location, construction, maintenance, repair, alteration, or use. * * *"

The parties argue at length in their briefs about the relationship between ORS 215.185 and the statutory scheme governing LUBA's review of land use decisions. Neither party cites *Mehring v. Arpke,* 65 Or App 747, 672 P2d 382 (1983), *rev den* 296 Or 411 (1984), where we decided that issue. We stated:

> "We cannot agree with plaintiffs' contention that ORS 215.185 provides a judicial remedy for a proposed violation of a comprehensive plan and zoning ordinance in a case where defendants' actions are taken in accordance with a 'land use decision' by a local government." 65 Or App at 751.[3]

Plaintiffs argue next that the county was required to, but did not, follow quasi-judicial procedures in considering the permit applications and that, as a result, "LUBA cannot act in this case because there is no record" and "only a court can proceed in those circumstances." Plaintiffs are incorrect. LUBA had authority under Oregon Laws 1979, chapter 772, section 5(4)(a), *as amended by* Oregon Laws 1981, chapter 748, (section 5),[4] to reverse or remand a land use decision if the

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"Notwithstanding subsection (1) of this section, the circuit courts of this state retain jurisdiction:

"(a) To grant declaratory, injunctive or mandatory relief in proceedings arising from decisions described in ORS 197.015(10)(b) or proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations; and

"(b) To enforce orders of [LUBA] in appropriate proceedings brought by [LUBA] or a party to the [LUBA] proceeding resulting in the order."

[3] Plaintiffs also rely on ORS 197.825(4), quoted in note 2, *supra.* That statute was enacted after this action was brought and after it was dismissed by the trial court. It is therefore unnecessary for us to construe the statute here.

[4] Section 5 was repealed by Oregon Laws 1983, chapter 827, section 59, and has been replaced by the materially similar provisions of ORS 197.835(8).

local governing body "[f]ailed to follow the procedure applicable to the matter before it" or "[m]ade a decision that was not supported by substantial evidence in the whole record."

For essentially the same reason, plaintiffs' argument concerning the constitutionality of the county ordinance under which the permits were granted has no bearing on whether the court rather than LUBA had subject matter jurisdiction. Assuming that the court would have had jurisdiction if LUBA lacked the authority to decide the constitutional question, LUBA *did* have that authority.

Plaintiffs *appear* to suggest that, because quasi-judicial procedures and the development of a record were required, the county's failure to meet those requirements means that it made *no* land use decision at all and that there was, therefore, nothing over which LUBA could exercise jurisdiction. Whether that point is one plaintiffs intended to make or is one we mistakenly discern in their argument, it is specious. If plaintiffs were correct in their contention that the county did not meet applicable requirements in making its decision, that would mean only that the county erred in connection with the decision; it would not mean that it made no decision. For the reasons we have discussed, any such error was corrigible through an appeal to LUBA.

Plaintiffs' final argument is that "LUBA HAS NO JURISDICTION—IT IS UNCONSTITUTIONAL." The basic point plaintiffs make to support that argument is that LUBA is a nonjudicial body that performs judicial functions and that its existence violates the separation of powers requirements of Article III, section 1, and Article VII (Amended), section 1, of the Oregon Constitution. Plaintiffs acknowledge that we addressed and rejected the same argument in *Baxter v. Monmouth City Council*, 51 Or App 853, 627 P2d 500, *rev den* 291 Or 368 (1981); *see also Bryant v. Clackamas County*, 56 Or App 442, 445, 643 P2d 649 (1982). However, plaintiffs contend that the issue should not have been reached in *Baxter*, that our discussion of it there was *dictum* and that:

> "Although LUBA has been with us since 1979, it is an agency whose role has been inexorably expanded by each legislature since. In its present (Or Laws 1983 cc. [sic] 826, 827) incarnation, the agency poses extremely troublesome

> separation of powers issues that are much more complex and pervasive than any considered previously. They deserve a more vigorously analytical exposition than Awopish *Baxter*."

Nothing in the legislation enacted since *Baxter* was decided, and nothing in plaintiffs' argument, persuade us that the issue plaintiffs raise should be decided differently now from the way we decided it in *Baxter*. If our discussion of the issue in *Baxter* was *dictum*, we now explicitly hold in accordance with it.

The word "Awopish" in plaintiffs' argument is presumably derived from "AWOP," an acronym of "affirmed without opinion." The meaning of plaintiffs' reference to AWOPs is somewhat obscure in its context, because plaintiffs also criticize at length the reasoning of our *opinion* in *Baxter*. However, we understand their point to be that, in their view, our opinion was not lengthy or probing enough.[5] After reviewing the arguments that plaintiffs offer to guide us in the more penetrating analysis they urge us to undertake, we conclude that *Baxter* requires no supplementation.

Affirmed.

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[5] We note in passing that, after plaintiffs' counsel exhorts us in his opening brief to give the issue "more vigorous scrutiny than has yet been applied," he states:

> "The author's recent circumstances (he has been too often in the garage and turned into a car) have rendered it impossible in this brief to outline the separation of powers issues in their deserved depth. With the indulgence of the court, plaintiffs will provide that elaboration, with specific reference to Oregon Laws 1983 cc. [sic] 826 and 827, in their reply brief."

We do not suggest that the scrutiny that proceeds that statement in the opening brief or that follows in the reply brief is less than vigorous.

SUPREME COURT'S ORDER DENYING RECONSIDERATION

IN THE SUPREME COURT
OF THE STATE OF OREGON

CA A28750
SC S31616

ARLOENE ELIZABETH WRIGHT, INA McCOY, and A. CLARK MOHR,	)
Petitioners on Review,	)
V.	)
KECH-TV, a federally licensed television station, et al	)
Respondents on Review.	)

ORDER DENYING RECONSIDERATION

The Court has considered the petition for reconsideration and ORDERS that it be denied.

DATE: November 26, 1985.

/s/ EDWIN J. PETERSON
Edwin J. Peterson
Chief Justice

TRIAL COURT'S LETTER OPINION

June 3, 1983

Counsel:

I have previously ruled in the Tower Action Case that the Court does not have jurisdiction.

The original complaint was dismissed, but with leave to amend.

An amended complaint was filed, and the defendants again filed their motions to dismiss on the same grounds.

Contemporaneous with thsi [sic] case, the Wright case came on for argument on a similar motion to dismiss.

The Court has received and reviewed memoranda from all attorneys representing all of the parties to each action.

I am still of the opinion that the Court does not have jurisdiction.

Both complaints present land use questions which are within the exclusive

jurisdiction of the Land Use Boad [sic] of Appeals.

Both motions are allowed, and the proceedings are dismissed with prejudice.

Very truly yours,
/s/ Richard D. Barber
Richard D. Barber
Circuit Judge

JUDGMENT OF DISMISSAL

IN THE CIRCUIT COURT OF OREGON STATE
For the County of Marion
Case No. 133,264

ELIZABETH ARLOENE WRIGHT, INA McCOY, and A. CLARK MOHR,

Plaintiffs,

vs.

KECH-TV, a Federally licensed television station, et al,

Defendants.

JUDGMENT OF DISMISSAL

(Entered June 16, 1982)

This matter came before the Court on Defendants' Motion to Dismiss.

*****

The Court considered oral argument, memoranda, affidavits and exhibits submitted, and issued a letter opinion dated June 3, 1983. Now, therefore,

THE COURT FINDS that Plaintiffs' claims present land use questions which

are in the exclusive jurisdiction of the Land Use Board of Appeals, and

IT IS HEREBY ORDERED that Plaintiffs' complaint is dismissed with prejudice. Defendants are awarded judgment against Plaintiffs for their costs and disbursements taxed and allowed by law.

DATED in Salem, Marion County, Oregon, June 16, 1983.

/s/ Richard D. Barber
Richard D. Barber
Circuit Judge

ORS 215.185

215.185 Remedies for unlawful structures or land use. In case a building or other structure is, or is proposed to be, located, constructed, maintained, repaired, altered, or used, or any land is, or is proposed to be, used, in violation of an ordinance or regulation designed to implement a comprehensive plan, the governing body of the county or a person whose interest in real property in the county is or may be affected by the violation, may, in addition to other remedies provided by law, institute injunction, mandamus, abatement, or other appropriate proceedings to prevent, temporarily or permanently enjoin, abate, or remove the unlawful location, construction, maintenance, repair, alteration, or use. When a temporary restraining order is granted

in a suit instituted by a person who is not exempt from furnishing bonds or undertakings under ORS 22.010, the person shall furnish undertaking as provided in ORS 32.010 to 32.060.

Oregon laws 1979 Chapter 772:

"Sec. 1a. It is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review. It is the intent of the Legislative Assembly in enacting sections 1A to 6a of this 1979 Act to accomplish these objectives.

Sec. 2. (1) There is hereby created a Land Use Board of Appeals consisting of not more than five members appointed by the Governor subject to confirmation by the Senate in the manner provided in ORS 171.560 and 171.570.*****

Sec. 3. As used in sections 4 to 6 of this 1979 Act:

(1) "Land use decision" means:

(a) A final decision or determination made by a city, county or special district governing body that concerns the adoption, amendment or application of:

(A) The state-wide planning goals;

(B) A comprehensive plan provision; or

(C) A zoning, subdivision or other ordinance that implements a comprehensive plan; or

(b) A final decision or determination of a state agency other than the Land Conservation and Development Commission, with respect to which the agency is required to apply the state-wide planning goals.

*****

Sec. 4. (1) Review of land use decisions under sections 4 to 6 of this 1979 Act shall be commenced by filing a notice of intent to appeal with the Land Use Board of Appeals. Subject to the provisions of section 6a of this 1979 Act relating to judicial review by the Court of Appeals, the board shall have exclusive jurisdiction to review any land use decision of a city, county or special district governing body or a state agency in the manner provided in sections 5 and 6 of this 1979 Act.

*****

(4) A notice of intent to appeal a land use decision shall be filed not later than 30 days after the date the decision sought to be reviewed becomes final. Copies of the notice shall be served upon the local government or special district governing body or state

agency and the applicant of record, if any, in the local government or special district governing body or state agency proceeding.***

ORS 215.243

215.243 Agricultural land use policy. The Legislative Assembly finds and declares that:

(1) Open land used for agricultural use is an efficient means of conserving natural resources that constitute an important physical, social, aesthetic and economic asset to all of the people of this state, whether living in rural, urban or metropolitan areas of the state.

(2) The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such

land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation.

(3) Expansion of urban development into rural areas is a matter of public concern because of the unnecessary increases in costs of community services, conflicts between farm and urban activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion.

(4) Exclusive farm use zoning as provided by law, substantially limits alternatives to the use of rural land and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zones.

MARION COUNTY, OREGON ORDINANCE

136.000 EXCLUSIVE FARM USE ZONE

136.010 PURPOSE. The purpose of the Exclusive Farm Use zone is to provide areas for the continued practice of commercial agriculture. The Exclusive Farm Use zone is to be applied in those areas of predominantly Class I through IV agricultural soils generally well suited for large scale farming, as indicated by the nature and type of soil, size and location of the property, the suitability of the terrain and other similar factors. It is also applied to intervening lands which are suitable for farm use or needed to protect farmland. These areas are designated as Primary Agriculture in the Marion County Comprehensive Plan.

Further, the Exclusive Farm Use zone is intended to preserve and maintain

areas so classified for farm use free from conflicting non-farm uses and influences. In order to achieve this purpose it is necessary to include incidental lands unsuitable for farming and some preexisting small farms and residential acreages and to require that contiguous ownerships be consolidated into larger parcels better suited to large scale management. It is not the intent in the EFU zone to allow partitioning and establishment of non-farm dwellings on unsuitable soils or the creation of small farms or residential acreages. Because of the wide variety of farm crops that can be grown in Primary Agriculture areas it has not been possible to establish lot size standards based on crop type. Rather, a case by case evaluation of the character of commercial agricultural operations in

the area provides the basis for determining the long-term ability of a property to sustain commercial agriculture. The EFU zone is intended to be a farm zone consistent with ORS 215.203.

136.020 USES. Within an EFU zone no building, structure or premises shall be used, arranged or designed to be used, erected, sturcturally [sic] altered or enlarged except for one or more of the following uses:

(a) Farm uses (see farm use definition);

(b) The propagation or harvesting of a forest product;

(c) A single-family dwelling or mobile home and other structures customarily provided in conjunction with farm use subject to Section 136.040(a);

(d) Utility facilities necessary

for public service, except commercial facilities for power generation;

(e) A site for the disposal of solid waste that has been ordered to be established by the Environmental Quality Commission together with equipment, facilities or buildings necessary for its operation;

136.030 CONDITIONAL USES. The following uses may be permitted in an EFU zone subject to obtaining a conditional use permit and satisfying the applicable criteria in Section 136.040.

(a) Additional dwellings or mobile homes in conjunction with farm use, meeting the criteria in 136.040(b);

(b) Single family dwelling or mobile home not in conjunction with farm uses, meeting the criteria in 136.040(a)1, (b)7, (c), (d) and the requirements in 136.050;

(c) Temporary residence for hardship purposes per Section 120.040, meeting the criteria in 136.040(c) and (d);

(d) Home occupations, meeting the criteria in 136.040(c) and (d);

(e) Exploration, mining and processing of geothermal aggregate and mineral or other subsurface resources not used exclusively in conjunction with farm or forest management, meeting the criteria in 136.040(d);

(f) Portable or temporary facility for primary processing of forest products as defined in ORS 215.213(2)(i), meeting the criteria in 136.040(d);

(g) Commercial activities in conjunction with farm or forest use, including processing and sale of firewood, meeting the criteria in 136.040(d);

(h) Private power generation facilities not in conjunction with farm use, meeting the criteria in 136.040(d);

(i) Personal-use airports for airplanes and helicopter pads, including associated hangar, maintenance and service facilities as defined in ORS 215.213(g), meeting the criteria in 136.040(d);

(j) The boarding of horses for profit, meeting the criteria in 136.040(d);

(k) Private parks, playgrounds, hunting and fishing preserves and campgrounds serving the general public, meeting the criteria in 136.040(d) and (c) or (e);

(l) Parks, playgrounds, campgrounds, group camping or community centers owned and operated by a governmental agency or non-profit

community organizations, meeting the criteria in 136.040(d) and (c) or (e);

(m) Public power generation facilities, meeting the criteria in 136.040(d) and (c) or (e);

(n) Solid waste disposal site together with facilities and buildings for its operation, meeting the criteria in 136.040(d) and (c) or (e);

(o) Churches, public and private schools, meeting the criteria in 136.040(d) and (c) or (e);

(p) Golf courses, meeting the criteria in 136.040(d) and (c) or (e);

136.040 CRITERIA FOR APPROVING CERTAIN USES. The uses identified in Section 136.030 and 136.020(c) shall satisfy the criteria in the applicable subsection below.

(a) The criteria for approving the uses in 136.020(c) are:

(1) The proposed dwelling shall be the only dwelling on the subject property and contiguous property in the same ownership; and

(2) The property on which the dwelling will be located must be in farm use and the dwelling be in conjunction with the farm use based on 136.040(f); and

(3) The property and improvements shall constitute a commercial farm enterprise as determined by an evaluation of the factors in 136.040(g); and

(b) The criteria for approving the uses in 136.030(a) are:

(1) The subject property and contiguous property in the same ownership is in farm use and the dwelling is in conjunction with the farm use based on 136.040(f); and

(2) Based on an evaluation of

the factors in 136.040(g) the property constitutes a commercial farm enterprise; and

(3) Operation of the farm, in accord with accepted farming practices, requires that the occupants of the proposed dwelling reside on the farm; and

(4) All dwellings located on the farm, except those permitted pursuant to 136.030(c), are occupied by households that perform a significant amount of farm work throughout the year; and

(5) The household residing in the proposed dwelling will perform a significant amount of farm work throughout the year that other households on the farm cannot accomplish; and

(6) If the proposed dwelling is not a mobile home that the occupants have a proprietary interest in the farm or it is evident that the long-term

requirements of the commercial farm operation justify another permanent dwelling; and

(7) That the dwelling will be consistent with the density policy if located in the big game habitat area identified in the Comprehensive Plan.

(c) Uses in 136.030(b), (c) and (d) shall be situated on generally unsuitable land for farm use considering the terrain, adverse soil or land conditions, drainage and flooding, location and size of the parcel.

(d) The following criteria apply to all uses in 136.030 except (a).

(1) The use is compatible with farm or forest uses and is consistent with ORS 215.243; and

(2) It does not interfere seriously with farming or forest practices on adjacent lands; and

(3) It does not materially alter the stability of the overall land use pattern of the area; and

(4) Adequate fire protection and other rural services are available; and

(5) Will not have a significant adverse impact on timber production, grazing land, watersheds, fish and wildlife habitat, soil and slope stability, air and water quality and outdoor recreation activities; and

(6) The proposed use complies with the purpose and intent of the agricultural policies in the Marion County Comprehensive Plan.

(e) The following criteria apply to uses in 136.030(k), (l), (m), (n), (o) and (p), if the criteria in 136.040(c) cannot be satisfied.

(1) There is a demonstrated

need that the use will satisfy for area residents or the general public which outweighs the need for, or benefits of, the existing or potential farm or forest use; and

(2) There is no other feasible location for the proposed use that would satisfy 136.040(c); and

(3) It will not cause adverse long term environmental, economic, social and energy consequences for the area, the region or the state.

(f) Farm Dwelling Determination: When determining whether a proposed dwelling is "customarily provided in conjunction with farm use" the following factors shall be considered: 1) size of entire farm unit including all contiguous land in the same ownership, 2) types of farm crops and acreage for each type, 3) operational requirements for the

particular farm or forest activity, 4) the number of other permanent or temporary dwellings on or serving the entire farm or forest unit, 5) number of owners/employees/workers on the farm or forest unit, permanent and seasonal, and 6) extent and nature of the work to be performed by occupants of the proposed dwellings.

(g) Commercial Farm Determination: When determining whether and [sic] existing or proposed parcel is a commercial farm enterprise, the following factors shall be considered:

Soil productivity, drainage, terrain, special soil or land conditions, availability of water, type and acreage of crops grown, crop yields, number and type of livestock, processing and marketing practices, and the amount of land needed to constitute a commercial

farm unit. Specific findings shall be made in each case for each of these factors.